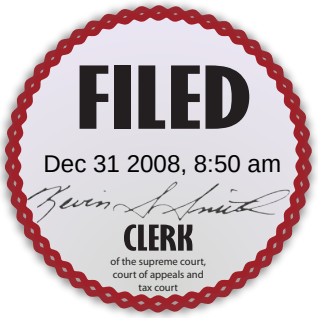

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IN THE
COURT OF APPEALS OF INDIANA

GARY COMMUNITY SCHOOL CORPORATION,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0805-CV-275
	)	
LOLITA ROACH-WALKER and VICTOR WALKER,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0609-CT-262

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The Gary Community School Corporation ("the School") appeals from a jury verdict in favor of Lolita Roach-Walker ("Walker") on Walker's complaint for damages arising from her slip and fall on the School's property. The School presents two issues for review, which we consolidate and restate as whether the School is entitled to immunity from liability under Indiana Code Section 34-13-3-3 of the Indiana Tort Claims Act ("the Act"). Walker also presents an issue for review, namely, whether she is entitled to appellate attorney's fees.

We affirm.

FACTS AND PROCEDURAL HISTORY

At nine o'clock on the morning of February 5, 2005, Walker took her children to Bailly Middle School for Saturday classes presented by the Gary Historical Society. The School had given the Gary Historical Society permission to use the middle school for the Saturday classes, and the weather was sunny and clear that day. But as Walker proceeded along the sidewalk entrance to the middle school, she slipped and fell on her knees. Walker reported the fall to the principal and completed an accident report.

On September 27, 2006, Walker and her husband filed suit against the School to recover for the injuries she had received in the fall and for loss of consortium. A jury trial was conducted on March 26, 2008. At the close of plaintiffs' evidence, the School moved for a directed verdict on the issue of the School's immunity under the Indiana Tort Claims Act. The trial court denied that motion. At the conclusion of all the evidence, the jury returned a verdict in favor of Walker on her claims and in favor of the School on

Walker's husband's loss of consortium claim. The School now appeals the verdict in favor of Walker.

DISCUSSION AND DECISION

Issue One: Immunity under the Indiana Tort Claims Act

The School contends that it is entitled to immunity under Indiana Code Section 34-13-3-3 of the Indiana Tort Claims Act. The Act governs tort claims against governmental entities and public employees. Brown v. Alexander, 876 N.E.2d 376, 380 (Ind. Ct. App. 2007), trans. denied. "Pursuant to the [Act], 'governmental entities can be subjected to liability for tortious conduct unless the conduct is within an immunity granted by Section 3 of [the Act].'" Id. (quoting Oshinski v. N. Ind. Commuter Transp. Dist., 843 N.E.2d 536, 543 (Ind. Ct. App. 2006)). Indiana Code Section 34-13-3-3(3) provides: "A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he temporary condition of a public thoroughfare . . . that results from weather."

The party claiming immunity bears the burden of establishing that its conduct comes within the Act. King v. Ne. Sec., Inc., 790 N.E.2d 474, 480 (Ind. 2003). "'[W]hether a governmental entity is immune from liability under the Act is a question of law for the courts, although it may include an extended factual development.'" Linden v. Health Care 2000, Inc., 809 N.E.2d 929, 933 (Ind. Ct. App. 2004) (quoting Minks v. Pina, 709 N.E.2d 379, 382 (Ind. Ct. App. 1999), trans. denied.), trans. denied. Immunity under Section 34-13-3-3 "contains two key concepts, one temporal and one causal." Hochstetler, 868 N.E.2d 425, 426 (Ind. 2007). A determination of whether a condition is

temporary or permanent is separate from a determination of whether the condition is due to some other cause. Catt v. Bd. Of Comm'rs, 779 N.E.2d 1, 5 (Ind. Ct. App. 2002). The focus of whether the condition is permanent is whether the governmental body has had the time and opportunity to remove the condition but failed to do so. See id.

Here, the School argues that it is immune from liability under Indiana Code Section 34-13-3-3(3) because the accident occurred on a public thoroughfare due to a temporary condition caused by the weather. Again, Walker concedes that the middle school sidewalk is a public thoroughfare and that the weather was the condition that caused the accident. Thus, the only issue is whether the slick condition of the sidewalk was temporary. See Ind. Code § 34-13-3-3(3). In other words, the issue is whether the School had time and opportunity to treat or remove the ice from the middle school's sidewalk. See Catt, 779 N.E.2d at 5.

Although bearing the burden of proof, the School has not directed us to any evidence to show that the condition was temporary. The School notes that Walker did not see ice before she fell, that there was a crowd around Walker on the sidewalk when she fell, that an eyewitness testified that the sidewalks looked wet at the time of Walker's fall, and that "[t]his could infer [sic] several different conditions of the sidewalk . . . . It could have been frost from the early morning; it could have been a very thin layer of ice; or most importantly, it could have been thawing ice." Appellant's Brief at 6. But that evidence does not address whether the School had the opportunity to remove the ice or other slick condition from the sidewalk. Indeed, the School has not refuted Walker's testimony that no snow fell on the evening before or the day of Walker's fall, nor did the

School point to any evidence regarding how long the condition might have existed on the sidewalk before Walker's fall. The School has not met its burden to show on appeal that the condition that caused Walker's fall was temporary.

In support of the argument that it is entitled to immunity, the School also cites to Ewald v. City of South Bend, 104 Ind. App. 679, 12 N.E.2d 995 (1938). In Ewald, this court held that a city

> is not liable for the fall of snow, rain or sleet or the consequent thawing and freezing and so far as we are advised is under no duty to remove all of the snow and ice. A city may become liable if it be shown that the streets have become defective and unsafe by reason of the fact that snow and ice have become an obstruction to travel and the city has had time and opportunity to remove it.

Ewald, 12 N.E.2d at 997. But Ewald was decided before the enactment of the Indiana Tort Claims Act. Indiana recognized the common law doctrine of sovereign immunity until 1972, when the Indiana Supreme Court abolished sovereign immunity in most areas. Brownsburg Cmty. Sch. Corp. v. Natare Corp., 824 N.E.2d 336, 345 (Ind. 2005) (citing Campbell v. State, 259 Ind. 55, 61-62, 284 N.E.2d 733, 736-37 (1972), superseded by statute). In response to Campbell, in 1974, the Indiana legislature enacted the Indiana Tort Claims Act, which identified a list of governmental activities that are immunized by statute from tort liability. Id.; see Ind. Code § 34-13-3-3. Thus, Ewald was overruled by the Act and does not apply.

Again, whether the condition on the sidewalk was temporary when Walker fell is a question of law, even though that determination includes a factual element. See Linden, 809 N.E.2d at 933. When denying the School's motion for a directed verdict at the close of plaintiffs' evidence, the trial court discussed the question of immunity under the Act,

stating: "it would appear that in light of the factual situation as developed in this case, that this is an issue that the jury needs to resolve." Transcript at 126. Because the issue of immunity under the Act, including any factual determination that must be made, is a question of law, that issue was not proper for the jury. See Linden, 809 N.E.2d at 933. Nonetheless, as noted above, on appeal the School has pointed to no evidence or supporting authority to show that the condition on the sidewalk when Walker fell was temporary. Thus, we conclude as a matter of law that the School has not demonstrated that it was entitled to immunity under the Indiana Tort Claims Act.[1]

Issue Two: Appellate Attorney's Fees

Walker requests this court to award her appellate attorney's fees. Indiana Appellate Rule 66(E) authorizes the award of appellate attorney's fees when an appeal is "frivolous or in bad faith." This court's discretion to award attorney's fees is limited to instances when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Knowledge A-Z, Inc. v. Sentry Ins., 891 N.E.2d 581, 586 (Ind. Ct. App. 2008). We use extreme restraint when exercising our discretionary power to award damages because of the potential chilling effect on the exercise of the right to appeal. Bergerson v. Bergerson, 895 N.E.2d 705, 716 (Ind. Ct. App. 2008). A strong showing is required to justify an award of appellate damages. Id.

[1] The School also argues on appeal that the trial court erred by refusing to give Defendant's Final Jury Instruction 8 regarding immunity under the Act. Because we have already determined that the School has not shown that it is entitled to immunity, we need not address that issue. In any event, review of that question is impossible because the School did not include in its appendix a copy of the final jury instructions given by the court, nor are the final instructions included in the transcript. See Stowers, 855 N.E.2d 739, 749 (Ind. Ct. App. 2006) (review of decision to refuse an instruction requires, in part, consideration of whether a refused instruction was covered in substance by other instructions), trans. denied.

In support of her request for appellate attorney's fees, Walker argues that "[a]ll of the issues presented in the School Corporation's appeal are well[-]settled issues of law. The School Corporation has failed to show any error by the trial court." Appellee's Brief at 14. But the question of immunity under the Indiana Tort Claims Act is a difficult one. Whether a governmental entity is immune from liability under Indiana Code Section 34-13-3-3(3) is a question of law, but determination of that question may require this court also to determine one or more questions of fact. Such is the case where an appellant cites to evidence in the record on appeal to support a finding that a weather condition was temporary.

Based on her argument that the question of immunity under the Act is well-settled, Walker concludes that the School's appeal is frivolous or in bad faith because the "only purpose of the School Corporation's appeal can be to delay resolution of this matter and payments to [Walker]." Id. But Walker has not pointed to any evidence to show that the School pursued this appeal in bad faith. Nor do we find the appeal to be frivolous or in bad faith. Again, the issue presented by the School on appeal regards a peculiarity in the law, namely, a question of law, reviewable de novo, which may require this court also to determine the facts. On the record presented, we cannot say that the School's appeal is frivolous or in bad faith. Thus, we decline Walker's request to award appellate attorney's fees.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.